IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1679

THE BATON ROUGE WATER WORKS COMPANY,

Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Petitioner, Baton Rouge Water Works Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above matter on January 24, 1977. Said opinion reversed the decision of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, and dismissed petitioner's suit.

OPINIONS BELOW

The opinion and order Number U-12569 of the Louisiana Public Service Commission, dated November 22, 1974, is unreported and is printed as Appendix A hereto, infra, p. 17. The original opinion of the Nineteenth Judicial Court, following grant of rehearing, is dated April 6, 1976, is also unreported, and is printed as Appendix B-1 hereto, infra, p. 25. The formal judgment of the Nineteenth Judicial District Court, dated April 14, 1976, is unreported and is printed as Appendix B-2, infra, p. 28.

The opinion of the Supreme Court of Louisiana is dated January 24, 1977, is reported in _____, La. _____, 342 So.2d 609, and is printed as Appendix C hereto, infra, p. 30. The dissenting opinion of one Justice of the Supreme Court of Louisiana is reported following the majority opinion and is printed as Appendix C-1 hereto, infra, p. 38. Notice of refusal of rehearing applied for by petitioner in the Supreme Court of Louisiana is unreported, is dated March 2, 1977, and is printed as Appendix C-2 hereto, infra, p. 45.

JURISDICTION

The opinion of the Louisiana Supreme Court was handed down on January 24, 1977, infra, p. 30. Rehearing was timely applied for and was refused on March 2, 1977 without comment (two Justices dissenting from the refusal), infra, p. 45. The jurisdiction of this Court is invoked under 28 U.S.C. 1247(3).

QUESTIONS PRESENTED

1. Can an order of the Louisiana Public Service Commission fixing rates for a regulated utility, withstand judicial review of its validity, if there be nothing in the record to support its order, and nothing in the order or opinion of the Commission which affords a reviewing court any opportunity for determining how, or why, or by what method the Commission computed or otherwise arrived at its stated conclusion.

2. Has petitioner, utility company, been afforded due process, if the Supreme Court of Louisiana accepts, and bases its opinion upon the appellate argument of counsel for the Commission to supply the alleged reasoning of the Commission, supply additional facts not otherwise of record, supply expert opinion allegedly pertinent to the case, but not of record, and supply financial statistical data as to other utilities, but not of record.

3. In the total absence of any explanatory opinion or findings of fact, can a reviewing court constitutionally affirm the totally unsupported and unarticulated order of the Commission of the grounds that (1) its decisions have a presumption of validity, and (2) the presumption that it is an expert body, without in any way pointing to or relying upon any evidence in the record, or anything in the opinion and order of the Commission which supports or explains the Commission's decision.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner here relies upon that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

". . . No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 21, 1974, the Baton Rouge Water Works Company, (hereinafter referred to as Company) made application to the Louisiana Public Service Commission for approval of an adjustment of rates and charges for water utility service sold by it within the City of Baton Rouge and the Parish of East Baton Rouge, State of Louisiana. This application requested authority to increase the Company's rates sufficient to provide additional gross revenues in the amount of One Million, Three Hundred Forty-One Thousand, One Hundred and 00/100 ($1,341,100.00) Dollars, based on financial results of the twelve (12) month period ended March 31, 1974. After notice to all interested persons as required by law, a hearing was held on this application in the City of Baton Rouge on July 15, 1974, at which time the Company offered testimony and supporting exhibits in justification of the requested increase. No opposition or objection to the application submitted by the Company was made and **the entire record consists solely of the testimony and exhibits offered by the Company.**

On November 22, 1974, the Commission issued its order Number U-12569 which provides, in part, as follows:

> "It was the findings of this Commission that the requested increase in revenues was excessive." . . .

> "Applicant be and is hereby authorized to file with this Commission revised schedules of rates and charges sufficient to provide additional gross operating revenues of not more than $874,250 annually." [Appendix A, infra, p. 17]

The Company timely appealed to the Nineteenth Judicial District Court by original petition filed therein, [Appendix D, infra, p. 46] which was answered by general denial. The matter was submitted to the Court **on briefs and on the record made up before the Commission.** On December 11, 1975, judgment was rendered affirming the Commission's order.[1] The Company's application for new trial was granted (limited to reargument), and after further argument and briefing, the Trial Court, on April 6, 1976 reversed itself, modified the Commission's order and rendered judgment granting the Company's request to impose rates sufficient to provide additional gross revenues totalling Four Hundred Thirty-Six Thousand Four Hundred Ninety-Seven and 00/100 ($436,497.00) Dollars, above the amount previously authorized by the Commission. So far as is here pertinent, the Trial Court stated:

> ". . . the record is barren of any evidence which would suggest that the 13% return on equity requested by petitioner is unreasonable. In the absence of such evidence, the Court has no alternative but to conclude the Commission's Order . . . is arbitrary and unreasonable." [Reasons for Judgment, p. 2, Appendix B-1, infra, p. 26]

The Commission timely perfected an appeal from the decision of the District Court to the Supreme Court of Louisiana.

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1. The original decision did not in any way deal with the question of return on equity, conceded by the Commission to be the **only quarrel in this litigation.**

The Supreme Court of Louisiana reversed the District Court and reinstated the Commission's order, among other things saying:

> "The chief difficulty with the Commission's argument is that it is based upon contentions made in brief, rather than upon express findings of the Commission to such effect.
>
> "For purposes of judicial review, and in order to assure that the Commission has acted in accordance with law, it is usually preferable that, in a contested case involving complex issues, the administrative agency makes findings as to the central disputed issues and explain the reasons for its determination. [Citations omitted]
>
> "We have not before now, however, held that such formal findings and reasons are sacrosanct to the validity of an administrative determination, unless required by statute." (Opinion of Supreme Court of Louisiana, p. 6, Appendix C, infra, p. 34-35)

The Court after then referring to some of the facts and arguments (and additional matter introduced into the case by counsel for the Commission in brief and oral argument) concluded its opinion by stating:

> "The Courts may not on judicial review substitute their judgment for the Commission's and overturn an administrative determination not shown to be clearly arbitrary as contrary to law or the evidence heard by the regulatory body. [Citations Omitted] No such arbitrariness being here demonstrated, the district court was in error in modifying the Commission's determination.
>
> "Accordingly, we reverse the judgment of the district court which modified the Commission order; and we dismiss this suit, at the cost of the plaintiff-appellee." [Opinion Supreme Court of Louisiana, p. 9, Appendix C, infra, p. 37]

Petitioner thereby timely filed motion for rehearing which was denied, without reasons, on March 2, 1977, with two Justices dissenting from the refusal to grant rehearing. [See Appendix C-2, infra, p. 45]

The constitutional issues here relied upon were raised in the first instance by petitioner's original pleading or petition filed in the District Court, and particularly in Paragraph 12, on Page 4 thereof, [Appendix D, infra, p. 50]. The District Court did not, as such, specifically refer to the constitutional questions in ruling in petitioner's favor, although the Lower Court's opinion implicitly recognizes the necessity for due process in its decision overturning the Commission's order. [See opinion of the District Court, Appendix B-1, infra, p. 25]

Trial in the District Court was solely on the record as made up before the Commission and certified to the Court by the Commission and no further pleadings (other than answer) were filed in the Lower Court.

On appeal to the Supreme Court of Louisiana by the defendant, Louisiana Public Service Commission, no new pleadings were filed (except an order of appeal) and the matter again submitted on argument and brief. Petitioner again in brief specifically raised the question of procedural and substantive due process in its exposition of issues, and cited and discussed several decisions of this and other federal courts dealing with due process and administrative decision on rate matters—thus insuring that the constitutional issues raised in

petitioner's original petition were continued before and presented to the Supreme Court of Louisiana.

The Supreme Court of Louisiana, as is apparent from its opinion [Appendix C, infra, p. 30], **never** referred to the requirements of either substantive or procedural due process by name, but its ruling, of necessity, deals with such issues in reinstating the Commission's order, and in pointedly ignoring petitioner's citation of authority with regard to due process required by the Constitution of the United States.

The constitutional issues, therefore, were initially raised in petitioner's first pleading and subsequently referred to and briefed, although such questions have not been, by name, dealt with in the opinion of the Supreme Court of Louisiana.

ARGUMENT

The questions herein presented are most substantial in view of the ever increasing regulatory control of vast portions of both business and personal activity by administrative boards and agencies with powers similar to those of the Louisiana Public Service Commission. Any diminution of the constitutional rights of due process afforded parties before such administrative tribunals—has a far reaching and ever growing effect upon substantial portions of the nation.

As administrative dockets grow ever more crowded, and judicial dockets are congested, there is the inevitable tendency to "shortcut" the hearing, the evidence, and the reaching of sound decisions. The tendency toward ill-considered attempts to "save time" or to clear the docket will—as here—result in substantial deprivation of constitutional rights, unless carefully safeguarded by this Court.

The decision of the Louisiana Public Service Commission and the affirming opinion of the Supreme Court of Louisiana are clearly contrary to the dictates of the Fourteenth Amendment, and the decisions of this court in that there is **no record evidence to support such decisions.** See *Interstate Commerce Commission v. Louisville & N.R. Co.*, 227 U.S. 57 L.ed 431, 33 S.Ct. 185 (1913); *Baltimore & Ohio R. Co. v. United States*, 264 U.S. 258, 63 L.ed 667, 44 S.Ct. 317 (1924); *Northern Pacific R. R. Co. v. Department of Public Works of Washington*, 368 U.S. 39, 69 L.ed 836, 45 S.Ct. 412 (1925). See also *Alabama Public Service Commission v. Southern Bell Telephone & Telegraph Company*, 253 Ala. 1, 42 So.2d 655 (1949) and *New England Telephone & Telegraph Company v. State*, 95 N.H. 353, 64 Atl. 2d 9 (1949). Such has even previously been the accepted law in the State of Louisiana. See *Louisiana Gas Service Company v. Louisiana Public Service Commission*, 256 La. 536, 237 So.2d 369 (1970).

All of the same authorities clearly indicate that the very purpose of judicial review is to determine if there be evidence of record to support the order of the administrative tribunal. The cases above cited uniformly hold that in the absence of such support in the record, judicial review compels the setting aside of such administrative decision.

In the present case, the hearing before the Louisiana Public Service Commission was conducted in accordance with its usual customs. The principal testimony of witnesses is prepared and furnished in advance along with any exhibits to be presented.

Petitioner here followed such procedure. Petitioner's three witnesses were sworn, testified as to the substance or

crux of their testimony, identified their exhibits, and likewise identified and verified the correctness of their "extended testimony" which was then filed into evidence. There were few if any questions by the Commission, no cross examination by counsel for the Commission, no evidence put in by the Commission nor by any opponent, no staff report was offered into the record at that time or subsequently, and after the abbreviated hearing, the matter taken under advisement by the Commission.

As may be stated without fear of contradiction or argument, the sole issue in this case—as in most utility rate cases —was the proper rate of return to be allowed for the equity component of the capital investment in the petitioning company.

Some four months later, the Commission handed down its order allowing petitioner to increase its revenues approximately two-thirds of the amount prayed for and more than amply substantiated by petitioner's evidence, exhibits and expert testimony. The Commission order itself is totally silent on how or by what method the Commission computed the result it decreed. The only clue was indicated in the brief notations on the face of the Commission record (in the nature of minutes) which indicates that at an executive session the decision was made to allow petitioner a 10.5% return on equity. Petitioner's expert testimony was to the effect that 15% return on equity was proper, although only 13% return on equity was prayed for and sought in petitioner's application.

This record made before the Commission, plus the Commission's order, was the only record before the District Court,

and the only record before the Supreme Court of Louisiana for its consideration. However, in the multiple briefs that have been filed—in the District Court, on rehearing in the District Court, on appeal to the Louisiana Supreme Court, and on application for rehearing in the Louisiana Supreme Court—counsel for the Commission has repeatedly referred to additional facts not of record, compiled financial statistics with regard to other companies not of record, cited expert testimony from another time and place not of record, and suggested and expounded on computations and reasons that the Commission **may have used** in reaching the result ordered. Petitioner earnestly submits that it is of utmost significance that such practice and procedure be condemned and set aside as gross failure to afford due process—particularly inasmuch as the Supreme Court of Louisiana entirely accepts and relies upon such "imported" facts, figures, authorities, and rationalizations of counsel as the basis for its opinion in affirming the order of the Commission.

Clearly, petitioner has not been afforded any opportunity for rebuttal, explanation, or cross examination, and has been subjected to a wholly arbitrary and capricious procedure in which decision has been made, not on the record, but upon such facts and rationalizations as were imported into the matter by argument of the Commission. Such procedure is likewise squarely and explicitly in conflict with the prior decisions of this court. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 L.ed 626, 63 S.Ct. 454 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 9 L.ed 2d 207, 83 S.Ct. 239 (1962); *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 31 L.ed 2d 170, 92 S.Ct. 898 (1972). See also *Interstate Commerce v. L. & N. R. Co.*, 227 U.S. 88, 47 L.ed 431, 33 S.Ct. 185 (1913); *U.S. v. Abilene & So. Ry Co.*, 265 U.S. 274, 68 L.ed 1016, 44

S.Ct. 565 (1924); *Ohio Bell Telephone Co. v. P.U.C. of Ohio*, 301 U.S. 292, 81 L.ed 1093, 47 S.Ct. 724 (1937).

Petitioner respectfully submits that it is the Commission's order, not counsel's subsequent arguments and briefs, that is subject to judicial review.

As this court stated in *Burlington Truck Lines v. United States*, supra: "The courts may not accept appellate counsel's post-hoc rationalizations for agency action"; (371 U.S. 156, 168). Similarly, this court remarked in *F.T.C. v. Sperry Hutchinson Co.*, supra: "The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order." (405 U.S. 233, 246)

Perhaps we may best illustrate the arbitrariness of the Commission's order, and the opinion of the Louisiana Supreme Court by pointing out that, while here the Commission ordered that petitioner be allowed a 10.5% return on equity (as distinguished from the 13% prayed for and proven in the record), every argument advanced by counsel for the Commission, and every factor relied on by the Supreme Court of Louisiana to justify affirmance of the Commission order could just have adequately bolstered and supported a much lower finding and order by the Commission. Had the Commission decreed a 9% return on equity or even an 8% return on equity, every one of the arguments of counsel and every statement made in the Louisiana Supreme Court opinion would be just as valid (or invalid) as is true in the present case. Since neither the Commission nor the Court furnishes any computation or discussion as to how

any particular mathematical result was reached, since neither the Commission nor the Court points to any particular evidence **of record** that the Commission relied upon, literally **any result** which the Commission decreed could be considered valid if the result reached by the Commission here be considered valid. Despite the holding in this case of the Louisiana Supreme Court to the contrary, this Court has long held that the presumption of expertise, or the presumption of valid action cannot be substituted for evidence in support of an administrative finding.

We would respectfully submit that if the presumed expertise of the Commission be allowed to override the record, then the whole process of a hearing, the preparation of a record, and decision making by the Commission becomes a mere farce. The preparation and transmittal of such record to a court for judicial review becomes meaningless, and due process of law is made a mockery.

The constitutional requirements are nowhere better stated by this Court than in the case of *Interstate Commerce Commission v. L. & N. R. Co.*, 227 U.S. 88, 57 L.ed 431, 33 S.Ct. 185 (1913). There this court held:

> ". . . A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes

under the Constitution's condemnation of all arbitrary exercise of power." (57 L.ed. 531, 433)

• • •

". . . The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U.S. 25, 48 L.ed. 860; 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. United States v. Baltimore & O.S.W.R. Co., 226 U.S. 14, [illegible], 104, 33 Sup. Ct. Rep. 5

As these contentions of the government must be overruled it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order. (57 L.ed 431, 434)

See also *U.S. v. Abilene & So. Ry Co.*, supra; *Ohio Bell Telephone Co. v. P.U.C. of Ohio*, supra; ***Miss. River Fuel Corp. v. F.P.C.***, 163 F.2d 433 (App. D.C.—1974)

The foregoing discussion, although directed at **procedural due process**, should not obscure the fact that the arbitrary order of the Commission has the effect of denying petitioner **substantive due process** in its application to petitioner's financial structure and integrity. In such effect, the decision of the Commission, and the opinion of the Supreme Court of Louisiana is in direct conflict with this Court's decisions in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 88 L.ed 333, 64 S.Ct. 281 (1943) and *Bluefield Water Works & Improvement Company v. Public Service Commission*, 262 U.S. 679, 67 L.ed 1176, 43 S.Ct. 675 (1923). However, the total denial of procedural due process is so obvious and glaring as to make the Commission's order invalid without the necessity for extended consideration of the financial effects thereof which would constitute denial of substantive due process.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-12569

THE BATON ROUGE WATER WORKS COMPANY

DOCKET NO. U-12569

EX PARTE

In re: Application for approval of an increase and adjustment of rates and charges for water utility service sold by the company within the City of Baton Rouge and Parish of East Baton Rouge, Louisiana.

The applicant has petitioned this Commission for authority to increase the rates charged for water service in order that the company earn additional revenues of $1,341,100 annually.

The proceeding was heard in Regular Session in Baton Rouge, Louisiana, on July 15, 1974, and taken under advisement.

Final consideration was given and a decision reached at a Business and Executive Session held in Baton Rouge, Louisiana, on October 23, 1974. It was the findings of this Commission that the requested increase in revenues was excessive.

Accordingly, it is

ORDERED, that:

(1) Applicant be and is hereby authorized to file with

this Commission revised schedules of rates and charges sufficient to provide additional gross operating revenues of not more than $874,250 annually.

(2) Applicant shall retain on file with this Commission all rates and charges currently in effect.

(3) The revised rates shall become effective with the first billing date after this Commission acknowledges receipt of the revised rate schedules in (1) above.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
NOVEMBER 22, 1974

CHAIRMAN ERNEST S. CLEMENTS DISSENTS

CHAIRMAN

s/ NAT KNIGHT

COMMISSIONER

s/ ED KENNON

COMMISSIONER

s/ LOUIS S. QUINN

SECRETARY

APPENDIX B

BATON ROUGE WATER WORKS

versus

LOUISIANA PUBLIC SERVICE COMMISSION

SUIT NUMBER 179,560—DIVISION I
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

FACTS

On May 21, 1974, petitioner, Baton Rouge Water Works Company, filed an application with the Louisiana Public Service Commission for approval of an increase and adjustment of rates and charges for water utilities service sold by the petitioner to the City of Baton Rouge and its surrounding areas. This application requested authority to increase petitioner's rates sufficient to provide additional gross revenues in the amount of $1,341,100.00, based on financial results of the twelve-month period ending March 31, 1974.

After due notice, a hearing was held on July 15, 1974, at which time petitioner offered testimony and filed additional evidence and exhibits. At the hearing there was no opposition nor objection to the petitioner's application.

On November 22, 1974, the Commission issued its order number U-12569 authorizing petitioner to increase rates and charges sufficient to provide additional gross operating revenue of not more than $874,250.00 annually and denying the

petitioner's request to generate revenues in excess of that amount.

Pursuant to Article 6, Section 5 of the Louisiana Constitution of 1921 and Article 4, Section 21(E) of the Louisiana Constitution of 1974, the petitioner has petitioned this Court for a review of the Commission's order.

The petitioner is legally qualified to furnish and is actually furnishing water service as a public utility in the City of Baton Rouge and surrounding areas within the Parish of East Baton Rouge and has been so engaged for a period of many years.

At the hearing, oral testimony was presented by three witnesses for petitioner; Mr. Raymond E. Pillow, President of the Baton Rouge Water Works Company; Mr. F. J. McDiarmid, an investment consultant; and Mr. E. D. Roberts, Jr., Vice President and Chief Financial Officer of the Baton Rouge Water Works Company.

Mr. Pillow testified that the company was currently operating on rates made effective July 1, 1969, and based on results of operations for 1967 as the test year. He further testified that all costs to the company are much higher now than in 1967, and that it is impossible for the present rate structure to produce adequate funds to support satisfactory service to the customers. Pillow also stated that the company had experienced an increase of 36% in operating expenses since the time the current rates were put into effect (1967). The witness also pointed out that past and continued expansion and improvement at continued higher costs could not be supported by the existing rate structure.

Mr. E. D. Roberts' testimony consisted of the identification and explanation of the petitioner's exhibits 1 through 7 which are attached to the record in this matter and self explanatory.

Mr. McDiarmid testified that there is a drastic increase in the cost of raising debt (bond) capital due to inflation. He also pointed out that the cost of equity capital (stocks) has also increased rapidly. The witness stated that failure to earn a reasonable return on its capital investment would result in the company's failure to maintain its financial integrity and a decrease in its ability to attract capital. The witness opined that a 15% return on equity was necessary to maintain this financial integrity. Petitioner, however, considers that a 13% return on equity would be sufficient, and avers that the evidence fully supports such a finding.

Petitioner contends that the testimony, evidence, and supporting exhibits presented on its behalf clearly justify the additional gross revenues applied for. Petitioner further avers that the record contains no evidence whatsoever in support of or affording any basis for the Commissioner's order and in the absence of such evidence to the contrary, the increase must be granted.

The Commission, on the other hand, takes the position that the fact that it presented no case-in-chief as such does not preclude it from considering and disbelieving or allowing or disallowing the substance of the petitioner's exhibits or witnesses. Rather, it is defendant's position that as a matter of sound regulatory law, it is legally obliged to adjust the petitioner's proposed rate base if the adjustment is so warranted. It is the opinion of the Commission that a basis for adjustment exists in this case due to the petitioner's erroneous inclusion of two items as rate-base components (i.e., those pertaining to deferred income taxes and customer deposits). Defendant contends that if these two items are excluded, as they more properly should be, the petitioner would realize a more-than-adequate 8.08% return on its rate base (resulting in a 10.5% return on equity). In support of its position, the Commission maintains that it need not introduce any ad-

ditional evidence, but rather merely rely on the evidence offered by the petitioner.

In its discussion of the treatment of deferred income taxes, the Commission cites numerous authority to the effect that Commissions frequently treat the items as one which reduces the rate base, thus giving ratepayers the full benefit of the interest free capital made available: *Re: Commonwealth Edison Co.*, 24 PUR 3d 209 (1958); *Re: Western Kentucky Gas Co.*, 21 PUR 3d 394 (1957); *Re: Kentucky Utilities Company*, 22 PUR 3d 113 (1958); *Re: Mobile Gas Service Corp.* (Ala.) Dk. 14908 (1960); *Re: Pacific Gas & Electric Co.*, 38 PUR 3d 1 (1961); *Re: San Diego Gas & Electric*, 39 PUR 3d 417 (1961); *Re: Public Service Co. of Colo.*, 34 PUR 3d 186 (1960); *Re: Honolulu Gas Co.*, 36 PUR 3d 309 (1960); *City of Alton v. Illinois Commerce Commission*, 19 Ill. 76, 33 PUR 3d 76, 165 N.E. 2d 513 (1960); *Re: Columbia Gas of Ky.*, 39 PUR 3d 401 (1959); *Re: Cumberland & A Gas Co.*, 36 PUR 3d 321 (1960); *Re: Public Service of New Hampshire*, 27 PUR 3d 113.

When this item is so deducted, it is sometimes treated (as in this case by the petitioner) as cost free capital. If so treated it reduces the earnings requirement and rate of return. In support of this result, the Commission cites Garfield and Lovejoy, *Public Utility Economics*, p. 113.

> "In general, however, Commissions have adopted one of two alternatives. (1) If the Commission decides that all benefits of accelerated depreciation should be passed on to consumers, it will direct that the reserve for deferred taxes . . . be deducted in determining the rate base . . . . Ratepayers thus are given free use of the plant and equipment (so) financed . . . . **Alternatively, the same result is obtained where the allowed rate of return is reduced by including the accumulated deferred tax fund as part of the capital structure at a zero rate of return** . . . . " (emphasis supplied)

The Commission notes that petitioner treats the item of deferred income taxes as includable in the capital structure at no cost. Thus, the Commission avers if the greater rate base includes some cost free capital, it does not need to earn at the same rate as a smaller rate base without cost free capital. Relying on the foregoing authorities, the defendant maintains that it is neither unreasonable nor arbitrary to reduce the rate base by the amount of deferred income taxes. Thus, a company which proposes to include interest free capital in its capital structure can not expect to earn the same rate of return as a company which eliminates such capital from its net rate base.

With respect to customer deposits, the Commission cites the following as authority for eliminating same from the rate base and disallowing any corresponding debt treatment:

"Garfield & Lovejoy state:

> 'Customer's contributions, as they are called, and also customer deposits and noninterest-bearing advances, are generally excluded from the rate base. The guiding principle here is that customers should not be required both to provide . . . capital and to pay a return on (it) . . . . Very few cases have held to the contrary.' " **Id.** at 72. (parenthetical expression supplied)

Thus, it is the Commission's position that an 8.08% rate of return (eliminating tax deferrals and consumer deposits from the rate base and capitalization) which results in a 10.5% return on equity is not unreasonable or arbitrary, and requires no remedial action of this Court.

LAW

According to the settled jurisprudence of our highest Court under the statutory standard of "just and reasonable," it is the result reached, not the method employed, which is controlling; *Federal Power Commission v. Hope Natural Gas*

Company, 320 U.S. 591, 64 S.Ct. 281. The findings and decisions of the Commission are to be accorded great weight and are not to be disturbed unless found to be clearly erroneous or unsupported by the evidence; ***Southern Pacific Transportation Company v. Louisiana Public Service Commission*** 290 So.2d 816 (1974), and cases cited therein. Whenever the Commission, in issuing an order, has acted within its power, and not arbitrarily or grossly contrary to the evidence, and when no error of law has been committed, the Court must not substitute its judgment for that of the Commission, or consider the expediency or wisdom of the order, or say whether on like evidence the Court would have made a similar ruling; see *Rubion Transfer and Storage Company v. Louisiana Public Service Commission* 240 La. 440, 123 So.2d 880 (1960).

Having considered the facts and circumstances of this case, this Court does not find that there are presently exceptional circumstances authorizing a finding that the Commission abused its discretion, or that its actions are arbitrary, discriminatory, capricious, and confiscatory. By so finding, this Court does not feel that the Commission's order should be disturbed in light of its presumption of legality.

Accordingly, judgment shall be rendered in favor of defendant, affirming its order of November 2, 1974, and against the petitioner, dismissing petitioner's suit at its costs.

Judgment will be signed accordingly.

BATON ROUGE, LOUISIANA, this 11th day of December, 1975.

s/ EUGENE W. McGEHEE

JUDGE

APPENDIX B-1

BATON ROUGE WATER WORKS

versus

LOUISIANA PUBLIC SERVICE COMMISSION

SUIT NUMBER 179,560—DIVISION I
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

On May 21, 1974, petitioner, Baton Rouge Water Works Company, filed an application with the Louisiana Public Service Commission for approval of an increase and adjustment of rates and charges for water utilities service sold by the petitioner to the City of Baton Rouge and its surrounding areas. This application requested authority to increase petitioner's rates sufficient to provide additional gross revenues in the amount of $1,134,100.00, based on financial results of the twelve-month period ending March 31, 1974.

After due notice, a hearing was held on July 15, 1974, at which time petitioner offered testimony and filed additional evidence and exhibits. At the hearing there was no opposition nor objection to the petitioner's application.

On November 22, 1974, the Commission issued its order number U-12569 authorizing petitioner to increase rates and charges sufficient to provide additional gross operating revenue of not more than $874,250.00 annually and denying the

petitioner's request to generate revenues in excess of that amount. From this order, petitioner sought judicial review.

The matter was originally submitted on memoranda and evidence introduced at the Commission hearing. For written reasons assigned, judgment was rendered on December 11, 1975, in favor of the Defendant Commission, affirming its order of November 22, 1974, and against the petitioner, dismissing petitioner's suit at its costs.

On February 6, 1976, petitioner filed a motion for new trial. Argument was had by counsel, and the matter submitted. For oral reasons assigned, judgment was rendered granting the motion for new trial and limiting same to re-argument.

The Court has considered the evidence and argument advanced by counsel. Albeit, the Court agrees with the position taken by the Commission that the two items concluded by petitioner as rate-base components, namely, deferred income taxes and customer deposits, reduce the earnings requirement and rate of return of petitioner, nevertheless, the record is barren of any evidence which would suggest that the 13% return on equity requested by petitioner is unreasonable. In the absence of such evidence, the Court has no alternative but to conclude that the Commission's Order Number U-12569, issued on November 22, 1974, is arbitrary and unreasonable.

Accordingly, judgment shall be rendered in favor of petitioner, Baton Rouge Water Works Company, and against defendant, Louisiana Public Service Commission, modifying defendant's Order Number U-12569.

Judgment shall further be rendered granting the necessary additional rate increase so as to afford petitioner additional increased gross revenue annually, based on operations

for the twelve month period ending March 31, 1974, of $436,497.00 in addition to the $874,250.00 granted by the Commission for a total of One Million Three Hundred Ten Thousand Seven Hundred Forty-Seven and 00/100 ($1,310,747.00) Dollars.

Judgment shall further be granted assessing defendant for all costs of this proceeding allowable by law.

Judgment will be signed accordingly.

BATON ROUGE, LOUISIANA, this 6th day of April, 1976.

s/ EUGENE W. McGEHEE

JUDGE

APPENDIX B-2

NINETEENTH JUDICIAL DISTRICT COURT
OF THE
STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BATON ROUGE WATER WORKS COMPANY

versus

THE LOUISIANA PUBLIC SERVICE COMMISSION

NUMBER 179,560

JUDGMENT

This matter having been duly submitted to the Court on the record made up before the Commission and on memoranda to the parties, and the Court having rendered judgment for written reasons assigned on December 11, 1975, in favor of the defendant Commission, affirming the Commission's order No. U-12569, dated November 22, 1974, and plaintiff having filed a motion for new trial on February 6, 1976, and judgment having been rendered granting motion for new trial but limiting same to reargument, for oral reasons assigned; the Court having taken further time to consider the argument of counsel and additional memoranda submitted by the parties, and the Court now considering the law and evidence to be in favor thereof, for the written reasons assigned in the opinion of this Court dated April 6, 1976;

IT IS ORDERED, ADJUDGED AND DECREED, that

there be judgment herein in favor of plaintiff, The Baton Rouge Water Works Company, and against the defendant, Louisiana Public Service Commission, modifying said Commission's Order No. U-12569, dated November 22, 1974, so as to afford to petitioner, The Baton Rouge Water Works Company, additional gross revenue annually, based on operations for the twelve (12) month period ending 1974, $436,497.00 in addition to the $874,250.00 previously granted by the Commission, or a total of ONE MILLION THREE HUNDRED TEN THOUSAND SEVEN HUNDRED FORTY-SEVEN AND NO/100 ($1,310,747.00) DOLLARS.

Judgment rendered April 6, 1976.

Judgment read and signed at Baton Rouge, Louisiana, this 14th day of April, 1976.

s/ EUGENE W. McGEHEE

JUDGE, 19TH JUDICIAL DISTRICT COURT

APPENDIX C

SUPREME COURT OF LOUISIANA

THE BATON ROUGE WATER WORKS COMPANY,

Plaintiff-Appellee,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,

Defendant-Appellant.

Appeal from the Nineteenth Judicial District Court, East Baton Rouge Parish, Honorable Eugene W. McGehee, District Judge, Presiding.

TATE, Justice.

The plaintiff ("Baton Rouge Water") sought judicial review in district court of the defendant Commission's failure to authorize higher rates so as to produce a 13% return on equity, as applied for, instead of the 10.5% allowed by the commission. The district court found the Commission's allowance of only 10.5% profit arbitrary, as contrary to the evidence, because allegedly the uncontradicted testimony of Baton Rouge Water's expert showed the utility to be entitled to the higher rate. The court then modified the Commission order so as to allow the higher rate of return on equity.

The Commission appeals to this court as authorized by Art. 4, Section 21, La. Const. of 1974. It contends that the trial court erroneously placed the burden on the Commission

of proving the petitioner's demand to be unreasonable and that it failed to give proper weight to the Commission's expertise in arriving at the proper rate of return on the investment in a closely-held local utility which obtains its equity capital by retaining earnings instead of paying full dividends.

The central issue of this appeal concerns to what extent, if any, the Commission may disregard uncontradicted expert opinion testimony before it in determining the rate of return on equity to be allowed for rate making purposes.

Facts

Baton Rouge Water applied to the defendant Commission for authority to charge increased rates so as to produce additional gross revenues of $1,341,100, which included a 13% return on equity. The additional revenues were necessary to permit Baton Rouge Water sufficient funds to meet increased costs and to expand operations, including the increased cost of borrowing funds, as well as allegedly to allow it a just and reasonable return on the applicant's investment.

After hearing, the Commission entered an order allowing increased revenues of $874,250, thereby allowing a return on equity of only 10.5%. Baton Rouge Water Works appealed to the district court, alleging that its uncontradicted expert testimony (based on a study of eight publicly quoted water company stocks) showed that 13% return of equity was necessary in terms of raising and supporting equity capital.[1] This expert witness testified that the eight water companies used by him were comparable equivalent to Baton Rouge Water.[2]

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1. Actually, this expert's opinion was that a 15% return on equity was necessary. However, Baton Rouge Water only seeks 13%.

2. Actually, the expert testified: "While the Baton Rouge Water Works Company has no common stock quoted on the public markets, it seems reasonable to assume that the cost to it of raising and sup-

The Commission introduced no opposing expert evidence. Nevertheless, in an unarticulated order which concluded that the requested increase in revenues was excessive, it authorized increased rates sufficient to produce additional revenues of $874,250 instead of the $1,341,100 prayed for (i.e., producing a return on equity of 1-0.5% instead of the 13% sought).

In reversing the Commission and in allowing the full increased revenues sought, the district court felt that the Commission was arbitrary in not accepting the uncontradicted testimony of the applicant's expert.

The Expert Opinion Testimony

The Commission concedes that its findings or conclusions may be set aside on judicial review as arbitrary, if not supported by the evidence. Louisiana Gas Service Co. v. Louisiana Public Service Commission, 256 La. 536, 237 So.2d 369 (1970); Southern Pacific Transportation Co. v. Louisiana Public Service Commission, 254 La. 23, 222 So.2d 499 (1969). However, the Commission points out, the evidence of the expert in the present record indicates on its face that Baton Rouge Water is entitled to a lesser rate of return than that to which he testified.

The general rule is that a regulatory body may use its own judgment in evaluating evidence as to a matter within its expertise; it is not bound by even uncontradicted testi-

porting equity capital would move in line with that of other utilities in the same line of business."

We also note that, in the most recent year, two of the eight "comparables" relied upon by him had an earnings-price ratio (alleged by the expert to be equivalent to a return on equity) less than the 10.5% return on equity allowed Baton Rouge Water by the Commission: Indianapolis Water, 10.15%; North Haven Water, 9.28%. Two others had an earnings-price ratio less than the 13% return on equity sought by Baton Rouge Water and allowed by the Commission: Hackensack Water, 12.46%; S. Cal. Water, 12.45%. (The "earnings-price ratio" was derived by the expert by dividing the earnings per share by the mean of the high and low market quotes for the particular stock on May 31, 1974.)

mony of experts which amount to mere opinions on their part. 2 Davis, Administrative Law Treatise, Section 14.13 (1958). Here, as the Commission points out, the opinion of Baton Rouge Water's expert is based upon his necessarily subjective evaluation of the implications of certain facts. We are cited to no authority which requires the Commission to accept without deviation the expert's opinion of the proper rate of return on equity to be ordered by it—at least where the factual data on which this opinion is based is reasonably susceptible to a different interpretation by the Commission, within its constitutional authority to make such fact and rate determinations based upon its own reasonable interpretation of the facts upon which the expert bases his opinion, as well as of the record as a whole.

The Commission suggests that the testimony of Baton Rouge Water's expert that the applicant is entitled to a 13% return on equity indicates on its face reasons why the Commission need not accept it as conclusive:

In the first place, the 13% rate proposed is founded on an average of the earnings-price ratios of eight utilities which, without supporting testimony, the expert assumed were comparable. See footnote 2. These publicly-held companies might be, but need not necessarily be (and are not shown to be), comparables insofar as the proper rate of return on equity for a closely-held corporation such as is Baton Rouge Water.[3]

Further, the expert based his opinion of a proper rate of return on equity on the earnings-price ratio of these possibly dissimilar utilities. This ratio is based on the earnings

3. For instance, unlike the "comparables," Baton Rouge Water finances its expansion from surplus earned for its investors rather than by diluting their capital ownership by offering stock to the public. This court has recognized that this may be a valid distinction for differences in rate treatment. LaSalle Telephone Co. v. Louisiana Public Service Commission, 245 La. 99, 157 So.2d 455 (1963). Cf. also Southern Bell Tel. & Tel. Co. v. Louisiana Public Service Commission, 239 La. 175, 118 So.2d 372, 385 (1960).

per share of the eight selected utilities based on the market value of their stock on a given day. In the absence of any shown relationship of the market value of the shares to the book value of the utility's capital, for rate-making purposes the rate of earnings so reflected are not indicative of the rate of return on equity of these utilities. See Southern Bell Tel. & Tel. Co. v. Louisiana Public Service Commission, 239 La. 175, 118 So.2d 373, 386-87 (1960).[4]

Finally, the Commission contends that the testimony of the expert on its face shows that he utilized a "fair value" concept of equity, not the "original cost" rule historically followed by Louisiana. Cf., Southern Bell Tel. & Tel. Co. v. Louisiana Public Service Commission, 239 La. 175, 118 So.2d 372, 386 (1970). Thus, the Commission suggests, it could disregard opinion testimony on a formula not accepted in Louisiana. Id.

Conclusion

The chief difficulty with the Commission's argument is that it is based upon contentions made in brief rather than upon express findings of the Commission to such effect.

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4. We have stated that the earnings-price ratio "serves as a reasonably reliable guide in fixing the cost of equity capital **when it is used with the exercise of an informed judgment based not only on the statistical data but also on the other relevant factors which cannot be measured precisely**." United Gas Pipe Line Co. v. Louisiana Public Service Commission, 241 La. 687, 130 So.2d 652, 660 (1961). (Boldface supplied) We also noted that for comparable purposes the earning studies of other companies "must be used with circumspection. It is difficult, if not impossible, to identify other business undertakings that are truly comparable." Id. at 130 So.2d 660-61. See also: In computing the rate of return to stockholders, "The procedure used here is that of ascertaining the appropriate rate from a study of earnings-price ratios, which rate is usually adjusted somewhat on the basis of the informed judgment of the Commission." Comment, 22 La.L.Rev. 257, 261 (1961). In the present case, for example, the Commission cites market-to-book ratios from certain authoritative publications indicating that in 1974 the market prices of seven of the eight utilities was from .411 to .800 of their actual book value, which had the effect of reducing the actual rate of return on equity for these utilities.

For purposes of judicial review, and in order to assure that the Commission has acted in accordance with law, it is usually preferable that, in a contested case involving complex issues, the administrative agency makes findings as to the central disputed issues and explain the reasons for its determination. Cf.: Louisiana Power and Light Co. v. Louisiana Public Service Commission, 324 So.2d 430 (La. 1975); White v. Louisiana Public Service Commission, 259 La. 363, 250 So.2d 368, 373 (1971); Hunter v. Hussey, 90 So.2d 429 (La. App. 1st Cir. 1956), certiorari granted. "It is enough if the Commission proffers findings and conclusions sufficiently detailed to permit reasoned evaluation of the purposes and implications of its order." In re Permian Basin Area Rate Cases, 390 U.S. 747, 814, 88 S.Ct. 1344, 1384 (1968). See also 2 Davis, Administrative Law Treatise, Chapter 16 (1958); 2 Cooper, State Administrative Law, 465-78 (1965); Schwartz, Administrative Law, Sections 140, 141 (1976).

We have not before now, however, held that such formal findings and reasons are sacrosanct to the validity of an administrative determination, unless required by statute. Nevertheless, Louisiana courts have on occasion remanded for this purpose, when unable to review the agency determination in the absence thereof. See Louisiana decisions cited in the preceding paragraph.

The general principle governing judicial review is that, where some evidence as reasonably interpreted supports the regulatory body's determination, the orders of the Commission and other regulatory bodies exercising discretionary authority are accorded great weight and will not be overturned by the courts in the absence of a clear showing that the administrative action is arbitrary and capricious. Truck Service, Inc. v. Louisiana Public Service Commission, 263 La. 588, 268 So.2d 666 (1972) and decisions therein cited.

In the present instance, the precise issue before us for

review is relatively simple: Was the administrative agency arbitrary in not accepting the uncontradicted testimony of the utility's expert that it was entitled to receive a 13% return on equity, but in instead allowing the utility only 10.5% (but almost two-thirds of the additional revenues sought)?

After reading the brief record, we are unable so to hold.

The expert's opinion testimony is that Baton Rouge Water is entitled to a 13% return on equity. This opinion is based upon the average earnings-price ratio of eight utilities on a given day, at least two of whom have earnings-ratios below the 10.5% return on equity ultimately allowed by the Commission. See footnote 2 above.

The earnings-price ratios of other utilities, while relevant, are only one factor along with others, in the Commission's determination of a rate of return, and one which must be used with circumspection due to the difficulty if not impossibility of true comparability of different utilities. See footnote 4 above and surrounding text.

Further, there can be no standard rate of return applicable to all utilities under all circumstances. The question of what constitutes a reasonable rate of return depends upon the peculiar situation of each utility, which is largely reflected in its own costs of capital. United Gas Pipe Line Co. v. La. Public Service Commission, 241 La. 687, 130 So.2d 652 (1961); Southern Bell Tel. & Tel. Co. v. La. Public Service Commission, 232 La. 446, 94 So.2d 431, 436 (1957). The present closely-held self-capitalized company is not shown to be truly comparable with the publicly-held companies used by the expert as a basis for his opinion. See LaSalle Telephone Co. v. Louisiana Public Service Commission, 245 La. 99, 157 So.2d 455 (1963).

It would have been preferable if the Commission order, in finding that the requested increase was excessive, had

specifically stated (for reasons such as are noted) why the Commission rejected or modified the 13% return on equity which the defendant's expert opinion stated was necessary. If the Commission had done so, this court could not, within the limitations of judicial review, hold that the Commission acted arbitrarily in so rejecting and modifying the return on equity which the expert believed to be necessary.

Under these present circumstances, where the findings and reason for the Commission's action are necessarily implied by the record, and where our study of the brief administrative record shows that on the simple issue presented for judicial review sufficient evidence supports the administrative determination, little purpose would be served by a remand for such formality. As stated under somewhat similar circumstances by the Florida Supreme Court, "it would be little more than a gesture to reverse the judgment and direct that the administrator be required to specify what so obviously was the reason for his action * * *." Little Man's Club v. Schotte, 60 So.2d 624 (Fla. 1962). See 2 Davis, Administrative Law Treatise, Sections 16.07, 16.14 (1958).

The courts may not on judicial review substitute their judgment for the Commission's and overturn an administrative determination not shown to be clearly arbitrary as contrary to law or to the evidence heard by the regulatory body. Truck Service, Inc. v. Louisiana Public Service Commission, 263 La. 588, 268 So.2d 666 (1972) and decisions therein cited. No such arbitrariness being here demonstrated, the district court was in error in modifying the Commission's determination.

Accordingly, we reverse the judgment of the district court which modified the Commission order; and we dismiss this suit, at the cost of the plaintiff-appellee.

REVERSED AND DISMISSED.

APPENDIX C-1

SUPREME COURT OF LOUISIANA

NO. 58,307

THE BATON ROUGE WATER WORKS COMPANY

versus

LOUISIANA PUBLIC SERVICE COMMISSION

SUMMERS, Justice (dissenting).

On May 21, 1974, Baton Rouge Water Works Company applied to the Louisiana Public Service Commission for approval of an increase and adjustment of rates and charges for water utilities service sold to the City of Baton Rouge and the surrounding area. The application requested authority to increase the Company's rates to provide additional gross revenues of $1,341,100, based upon financial results of the twelve-month period ending March 31, 1974.

After notice, a hearing was had on July 15, 1974, at which the Company offered testimony and filed evidence and exhibits. No opposition or objection to the Company's application was made at the hearing.

The following is a summary of the expert testimony presented by the Company at the hearing. The public utilities of this country today face by far the worst financing problem in their history. The interest rates on the bonds they sell have more than doubled over the last ten years and the cost of raising and supporting equity capital in terms of required

earnings and dividends has gone up even more. This is due to the present high rate of inflation. It is a long term historical fact that inflation is something that must be paid for in the interest rate and in the cost of capital in general.

Ten years ago Baton Rouge Water could have sold long term bonds at a cost of 5% or less. Today they would do well to do the same thing at a cost of 10%, and if inflation is not abated this cost could go higher. High grade corporate bonds in Britain, where inflation is worse than here, now sell to yield about 16½%.

The high interest rates that utilities now have to pay is probably well understood and recognized by regulators. What has not yet been adequately recognized by them has been the drastic increase in the cost of equity capital. Bonds and stocks are of course interchangeable forms of investment and what happens to the yield on bonds directly affects what investors expect from stocks. It couldn't be any other way.

In the years 1963 to 1965 when utility stocks were in favor with investors, and not in disfavor as they are now, most electric stocks sold in the range of 18 to 22 times earnings. They now mostly sell in the range of 6 to 8 times earnings. Most of these stocks are selling way below book value, which means that new stock can only be sold at the cost of seriously diluting the position of the old stockholders. This in turn can only lead somewhere along the line to a cut in dividends per share. From the Consolidated Edison experience, it means being cut off from all types of financing, bond and stock alike.

Water company stocks, while not so well publicized because there are so few of them, fared nearly as badly as electric stocks. A study of the behavior of 8 water company stocks, which is about all that are publicly quoted, is presented. This study shows that in the years 1963 to 1965 it

required only about $6.25 of reported earnings to support $100 of market value of these stocks on average. As of May 31, 1974, it required over $13 of earnings to do the same job. That indicates more than a doubling in the cost, in terms of earnings, of raising and supporting equity capital by these 8 water companies. From that point the situation has deteriorated further. Taking into account the cost of selling new shares, and depression in the market resulting therefrom, it was concluded that these water companies would require a 15% return on equity capital to enable them to realize from the new shares as much as the book value of the old shares.

A 15% return on book equity is recommended for Baton Rouge Water. This represents only a 9.1% return on this equity revalued in dollars of present purchasing power. By past standards 15% on book equity looks high, but it doesn't any more—not in a period when the banks are charging their most credit worthy borrowers 12% for short term money, often demanding compensating balances besides which increases the effective rate. A 15% return on equity is not over 5% more than the likely present cost of bond money. Back in the period when bonds yielded 5% or less, a 10% return on equity to a utility like Baton Rouge Water was considered reasonable and most utilities were then earning more than this. The testimony indicates that the cost of equity capital has gone up at least as much as the cost of debt capital.

Baton Rouge Water Works has not sold new stock to the public, at least for a long time. It has added the required equity capital by retaining most of its stockholders' earnings. This is not a good reason why it should be discriminated against in the rate of return allowed. If this were the case, it would be in the stockholders' interest for the company to pay out all its earnings, and raise new equity capital by selling stock.

The matter was taken under advisement and on November 22, 1974 the Commission issued its order finding "that the requested increase in revenues was excessive." No other findings or reasons were assigned. Accordingly, revised schedules of rates were ordered filed to provide additional operating revenues of not more than $874,250 annually in lieu of the $1,341,000 requested by the Company.

Pursuant to Article VI, Section 5, of the Constitution of 1921 and Article IV, Section 21(E), of the Constitution of 1974 the Company appealed the Commission's order to the Nineteenth Judicial District Court.

On first consideration the district court affirmed; however, on the Company's application a new trial was granted limited to reargument. On reconsideration the trial judge found that "the record is barren of any evidence which would suggest that the 13% return on equity requested by petitioner is unreasonable." The trial judge was of the opinion that in the absence of such evidence, the court has no alternative but to conclude that the Commission's order was arbitrary and unreasonable. Accordingly, judgment was rendered, setting aside the Commissioner's order and granting the necessary rate increase to afford gross revenue annually of $1,310,747 as requested by the Company.

From the district court judgment the Commission appealed to this Court, specifying as grounds for reversal the allegations that the judge of the district court 1) shifted the burden of proof, 2) failed to give weight to the Commission's expertise, and, alternatively, 3) should have remanded the case to the Commission.

These contentions are argued together and the principles involved are interrelated to such an extent that they will be treated together.

The finding of the trial judge that there was no evidence to refute the proof of the Company does not shift the burden of proof to the Commission to prove that the requested return on equity is unreasonable. The burden of proving reasonableness rests upon the applicant. However, when the applicant does establish the reasonableness of the requested rates, the Commission may not deny the request unless there is an evidentiary basis for its action. LeSalle Telephone Company v. Louisiana Public Service Commission, 245 La. 99, 157 So.2d 455 (1963); Missouri Pacific Railroad Company v. Louisiana Public Service Commission, 238 La. 243, 115 So.2d 337 (1959); Gulf States Utilities Co. v. Louisiana Public Service Commission, 222 La. 132, 62 So.2d 250 (1952).

The absence of any opposition to the Company's application plus the fact that there is no evidence to contradict their exhibits or to refute the credible testimony of their experts is not of the Company's making. In the absence of such countervailing or rebuttal evidence the Company has discharged its burden of proof if it makes a showing of reasonableness. While this situation does not necessarily shift the burden to the Commission to prove that the rates requested are unreasonable, in the absence of evidence to contradict the showing of reasonableness the Commission may not reject the proof thereby established.

Some evidence is required to support the order of the Commission, whether it be produced by the Commission, by opponents, or, as may happen at times, by self-defeating evidence of the applicant. Although we cannot say who must bring this countervailing evidence to the record, it is sufficient to say it must be there. In any case, the presumed expertise of the Commission cannot alone serve to refute facts amply established by proof in the record.

In Mississippi River Fuel Corporation v. Federal Power Commission, 163 F.2d 433 (D.C. Cir. 1947) the court rejected

a commission contention which would have resulted in perfunctory judicial review, stating:

> ". . . The Commission says that a reviewing court is limited to a consideration of the 'end result,' the rate, or price, prescribed by the final rate order for the commodity or service.
>
> . . . . . .
>
> ". . . The Commission seems to contend that the court must examine the rate per se, as an abstraction, or as a naked economic fact, divorced from the elements of which it is composed and regardless of its effects; and if it appears fair and reasonable upon such examination, it must stand. Such contention is without merit, either upon reason or upon authority and moreover is impossible of practice.
>
> . . . . . .
>
> "The Commission says, 'The Court, unlike the Commission, is not an expert body * * *.' Be that as it may, the Commission, even though expert, is forbidden to be arbitrary. And the courts are directed to prevent it from being so. The Commission cannot, and we do not understand it to claim that it can, shield arbitrariness by averments of its own infallibility, by technical expressions, or by failure to state adequate reasons for its conclusions. . . ."

. . . . . .

Pertinent principles are also stated by this Court.

"It is the settled jurisprudence that where the findings and conclusions of the Commission are not supported by the evidence, the order is unreasonable, arbitrary and unwarranted, and it is the duty of the court to vacate such an order. . . ." Louisiana Gas Service Company v. Louisiana Public Service Commission, 256 La. 536, 237 So.2d 369 (1970).

It is essential to the exercise of this Court's appellate

jurisdiction, La. Const. art. IV, §21(E) (1974), that the basis for the Commission order be established by the record. For it is not only the right but the duty of this Court to determine whether the order was justified by the facts. Railway Express Agency v. Louisiana Public Service Commission, 243 La. 518, 145 So.2d 18 (1962).

Here there is no evidence to contradict what I consider to be a prima facie showing by the Company that its proposal was just and reasonable.

Remand, which the Commission seeks, should only be permitted in those instances where the party seeking that result has made a reasonable effort to support its position with proof at the trial. In the case at hand the Commission made no effort whatsoever in this respect. The delays already involved in this case and the lack of any indication in this record that the Commission could or would refute the Company's position by proof do not warrant a remand in the interest of justice. Harris-Irby Cotton Co. v. State, 31 Okla. 367, 121 P. 642 (1912).

I would affirm the judgment of the district court.

APPENDIX C-2

SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 2nd day of March, 1977, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

• • •

REHEARINGS REFUSED:

• • •

58,307 Baton Rouge Water Works v. LPSC
SUMMERS & DENNIS, J. J., are of the opinion that a rehearing should be granted.

• • •

APPENDIX D

NINETEENTH JUDICIAL DISTRICT COURT

OF THE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

THE BATON ROUGE WATER WORKS COMPANY

versus

LOUISIANA PUBLIC SERVICE COMMISSION

Number 179,560, Division I

PETITION

The petition of THE BATON ROUGE WATER WORKS COMPANY, a Louisiana corporation domiciled in the Parish of East Baton Rouge, State of Louisiana, with respect represents that:

1.

Petitioner is a Louisiana corporation, duly organized under the laws of said State, and is domiciled in the Parish of East Baton Rouge; Petitioner is now and has been for many years engaged in the water utility business in the City of Baton Rouge and surrounding area. Louisiana Public Service Commission (hereinafter sometimes referred to as "the Commission") is a body politic and corporate created by and under the Constitution of the State of Louisiana and particularly Section 21 of Article IV and is domiciled in the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana.

2.

Among the powers and duties conferred by the Constitution and the statutes of the State of Louisiana upon the said Commission is the reasonable and just regulation of rates charged and service rendered by utility companies, including water works utilities companies, operating in the State of Louisiana.

3.

On May 20, 1974, Petitioner filed an application with the Commission for authority to file with the Commission a revised schedule of rates and charges for water utility service sufficient to provide applicant with additional gross operating revenues of not less than One Million Three Hundred Forty-one Thousand One Hundred Dollars ($1,341,100) annually, based upon its operations for the twelve-month period ending March 31, 1974. Immediately upon the filing of said application, due notice of the said filing was given to all public officials and the local news media, under date of May 21, 1974.

4.

After due notice thereof to all interested parties, a hearing on said application was held in the City of Baton Rouge, Louisiana, on July 15, 1974; no objection or opposition to Petitioner's application was at that time, or since, filed with the Commission and no appearance was made at the said hearing in opposition to Petitioner's said application.

5.

At the aforesaid hearing Petitioner offered and filed certain evidence and the matter was laid over by the Commission for further study and considerations by the Commission.

6.

No further hearing was held and no further evidence ever offered in said matter and, following final consideration by the Commission at a closed Business and Executive Session on October 23, 1974, the Commission issued its order number U-12569, dated November 22, 1974, authorizing Petitioner to adjust its rates and charges such that additional gross revenue in the amount of not more than Eight Hundred Seventy-four Thousand Two Hundred Fifty Dollars ($874,-250.00) annually and denying Petitioner's application for authority to file rates and charges to generate any gross revenue in excess of said amount of Eight Hundred Seventy-four Thousand Two Hundred Fifty Dollars ($874,250.00).

7.

The City of Baton Rouge and the surrounding area served by Petitioner has and continues to grow and expand, and Petitioner has continued to face increased demands for additional investment in facilities, all at continuously increasing cost and, in addition, has, in common with all other business operations, been faced with markedly escalating costs of operations and maintenance.

8.

The aforesaid expansion and growth of Petitioner's facilities at increasing costs (both in total amount and in investment per customer), together with increasing costs of operations and maintenance, and the increased cost of borrowed funds to Petitioner, has resulted in **net** earnings to Applicant which are now and have been wholly inadequate and provide so small a return to Petitioner on Petitioner's facilities and investment as to be unjust and unreasonable.

9.

Continuation of the previous rates, increased only to the limited extent authorized by the Commission in this matter, results in confiscation of Petitioner's property and does not and will not provide a just and reasonable return on investment or that return to which Petitioner and Petitioner's stockholders are entitled under the Constitution and the laws of the State of Louisiana and under the Constitution of the United States.

10.

In order to reasonably meet the cost of furnishing service to Petitioner's customers, and in order to provide a fair, just and reasonable return to Applicant on its investment in property and facilities used and useful in furnishing water utility service, Applicant must receive total additional gross annual revenues in the amount of $1,341,100.00 or $466,-850.00 more than allowed by the Commission.

11.

Petitioner's evidence offered in this matter is without any contest or contradiction and shows that:

(a) Petitioner's deficiency in gross revenue necessary to yield a reasonable and just return after expenses has been and continues to increase.

(b) The annual cost of Debt Money (Bonds) that must be paid by Petitioner has substantially increased since the time rates were last adjusted based on 1967 costs, and will continue to increase as additional funds are obtained at current high bond market rates.

(c) The average amount of investment in utility plant per customer, to furnish service, has and continues to increase

markedly while the average of consumption per customer has remained relatively constant, necessitating increased rates to maintain any balance between plant investment and income to support and finance same.

(d) Petitioner has requested revenues sufficient to provide a return on equity money invested in the company of only thirteen per cent (13%) per year, while the only testimony or evidence in the record indicates the necessity for a fifteen per cent (15%) return is required under current market and investment conditions.

12.

The said Order No. U-12569 issued by the Commission denying any increase in excess of $874,250 (based on operations for the twelve-month period ending March 31, 1974) is contrary to the law and the evidence, and is unreasonable, unjust, arbitrary, confiscatory, discriminatory, an abuse of the discretion vested in the Commission, and is in violation of the Constitutions of the United States and of the State of Louisiana, especially the due process of law and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 4 of Article I of the Constitution of the State of Louisiana. As grounds therefor, Petitioner alleges and avers that:

(a) The Commission committed error in ignoring the testimony and exhibits offered by Petitioner and failed to rule on the basis of same, despite the complete absence of any other evidence of any kind and despite the absence of any opposition or objection to Petitioner's request.

(b) The Commission committed error in failing to provide to Petitioner sufficient gross revenue to pay Petitioner's operating expenses, fixed charges, taxes, depreciation and interest and leave a reasonable

return for the equity investment of Petitioner and Petitioner's stockholders.

(c) The Commission erred in failing to find on the basis of the only evidence in the record before it or, if in fact the Commission did consider anything other than the evidence in the record, it completely and utterly violated Petitioner's rights by considering matters not of record, not furnished to Petitioner, not offered at hearing, not subject to cross-examination, or opportunity for rebuttal.

(d) The Commission further erred in failing to provide for, or even to find or determine the amount of an adequate return on the equity investment of the Company and its stockholders invested in water utility service furnished by the Company.

(e) The Commission committed error in allowing so small an increase in revenue as to limit Petitioner to a wholly inadequate and unreasonable return on equity investment, which computes to a 10.3% return.

(f) The Commission erred in failing to find that Petitioner was entitled to an increase of its gross revenues (based on operations for the twelve month period ending March 31, 1974) of One Million Three Hundred Forty-one Thousand One Hundred Dollars ($1,341,100.00).

(g) The Commission erred in confining Petitioner to its present rates, plus a wholly inadequate adjustment, thus depriving Petitioner of a reasonable and just rate of return, particularly on its equity investment, and thereby depriving Petitioner of its property without due process.

WHEREFORE, Petitioner, The Baton Rouge Water Works Company, prays that Defendant, The Louisiana Public Service Commission, be cited according to law to appear and answer this Petition and that, after due proceedings had, there be judgment herein in favor of The Baton Rouge Water Works

Company and against the said Louisiana Public Service Commission, finding and holding and declaring the Order No. U-12569, dated November 22, 1974, affords to Petitioner, The Baton Rouge Water Works Company, a wholly inadequate and unjust and unreasonable return, and modifying, adjusting and amending same so as to provide for increased rates and charges such as will afford Petitioner increased gross revenues annually (based on operations for the twelve-month period ending March 31, 1974) of One Million Three Hundred Forty-one Thousand One Hundred Dollars ($1,341,100.00).

Petitioner further prays for all orders and decrees necessary or proper in the premises, and for general and equitable relief.

BY ATTORNEYS,

TAYLOR, PORTER, BROOKS & PHILLIPS

BY: /s/ F. W. MIDDLETON, JR.
P. O. Box 2471
Baton Rouge, La. 70821
504 / 387-3221, Ext. 24

PLEASE SERVE DEFENDANT:

Louisiana Public Service Commission
American Bank Building
Baton Rouge, Louisiana

PROOF OF SERVICE

I, F. W. Middleton, Jr., attorney for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1977, I served three (3) copies of the foregoing petition for a writ of certiorari on respondent, Louisiana Public Service Commission, by mailing through the United States mail the same to its counsel of record, Mr. Marshall B. Brinkley at his mailing address P. O. Box 44035, Baton Rouge, Louisiana 70804, first-class, postage prepaid.

All parties required to be served with copies of this petition for a writ of certiorari have been served.

May ____, 1977.

F. W. Middleton, Jr.